insured were finally fixed when he gave notice of abandonment, or whether those rights could be affected by a subsequent change in the condition of the ship. It was arguable from certain early cases of ships captured and recaptured that what was once a constructive total loss could thus become a partial loss. *Hamilton* v. *Mendes*, 2 Burr. 1199. No English case, however, had gone to the length of the contention of the underwriters that they could themselves expend money upon a ship which was once a constructive total loss, and that by improving her condition to such an extent that her owner if uninsured could no longer with reason think of abandoning her they could change her from a total loss to a partial loss, and thus escape full liability. The result would be that the distinction between a constructive total loss and a partial loss would no longer depend upon the question, when would a prudent uninsured owner abandon his ship? but, how much would an astute underwriter expend to turn a constructive total loss into a partial one? However, the subtle contention failed.

The problem in insurance is always the practical one, how did the parties understand their contract? It has indeed been the theory of the text-books that a ship is an actual total loss only when it ceases to exist *in specie* as a ship. But as a matter of fact the owner doubtless understood that it would be considered an actual total loss if his vessel sunk. The title to the wreck would then pass to the underwriters, and the risk of marketing it be upon them. As the Lord Chancellor declared, when his vessel reached the bottom of the sea the owner expected to be quit of it, though modern mechanical skill might bring it up again. At all events, the decision must effect the great object in mercantile law, — certainty.

RECENT CASES.

BILLS AND NOTES — CHECKS — NOTICE TO DRAWER. — The holder of a check brought an action thereon against the drawer, but the declaration did not allege that notice of its dishonor was given him. On the demurrer to a declaration, *held*, that judgment be given for the plaintiff. *Spink & Keyes Drug Co.* v. *Rayn Drug Co.*, 75 N. W. Rep. 18 (Minn.).

To charge the drawer of a bill, due notice to him must be alleged and proved by the holder. On the other hand, the drawer of a check must have suffered loss by reason of no notice being given him in order to escape liability on that ground. 2 Daniel, Neg. Inst. § 1587. Therefore the court properly holds that the burden of establishing loss is upon the drawer, and that he should allege and prove "no notice." *Harbeck* v. *Craft*, 4 Duer, 122. He is then assisted by a presumption that damage was suffered by him. *Ford* v. *McClung*, 5 W. Va. 156. Yet this presumption only shifts to the holder the burden of adducing evidence to rebut it, and the burden of proof remains throughout on the drawer. For other reasons it seems that "no notice" should be treated as an affirmative defence, not only in the case of checks, but also in that of all bills and notes. The cause of action is complete upon default at maturity, even though no notice be given. This is shown by the fact that the drawer or indorser may thereafter waive the laches of the holder.

BILLS AND NOTES — TRANSFER — NOTICE. — The defendant made a promissory note payable to A, who indorsed it to the plaintiff. The defendant was induced to make the note by the fraudulent representations of A. *Held*, that to recover on the note the plaintiff must take it without such notice of the fraud as would put a prudent man upon inquiry. *Limerick National Bank* v. *Adams*, 40 Atl. Rep. 166 (Vt.).

In accord is the early decision in England of *Gill* v. *Cubitt*, 3 B. & C. 466. That case has since been overruled by *Goodman* v. *Harvey*, 4 A. & E. 870, and is *contra* to the great weight of authority in this country. *Johnson* v. *Way*, 27 Oh. St. 374; *Hotch-*

kiss v. *National Bank*, 21 Wall. 354. The better view seems to be to determine whether the particular purchaser acted in good faith and not to establish a standard of care in such a case. The negotiability of such instruments is thus greatly promoted, which is desirable in the interests of commerce.

BILLS AND NOTES — UNCERTAINTY IN AMOUNT. — A promissory note for a certain sum provided for the payment of attorney's fees in case of suit at maturity on default. *Held*, that this provision renders the note uncertain in amount and so not negotiable. *Roads* v. *Webb*, 40 Atl. Rep. 128 (Me.).

The better opinion seems *contra*, as well as the weight of authority. See 11 HARV. LAW REV. 61.

CONFLICT OF LAWS — NON-RESIDENT — GARNISHMENT. — A debt due a citizen of Alabama, and payable in Alabama, was garnisheed in a Tennessee court. Notice was served on the principal defendant by publication. He did not appear, and judgment went by default. *Held*, that the garnishee court had no jurisdiction over the debt, and its proceedings were void. *Louisville & Nash R. R. Co.* v. *Nash*, 23 So. Rep. 825 (Ala.).

It has been held that for the purpose of garnishment a State has the power to fix by statute the situs of a debt at the domicile of the debtor, although the creditor is a non-resident. *Williams* v. *Ingersoll*, 89 N. Y. 508; *Bragg* v. *Gaynor*, 85 Wis. 468. The principal case, in holding the situs is not affected by the enactment of statutes, has also the support of authority. *Ill. Cent. R. R. Co.* v. *Smith*, 70 Miss. 344; *Missouri Pac. Ry. Co.* v. *Shariff*, 43 Kan. 375; *Lovejoy* v. *Albee*, 33 Me. 414. The latter view commends itself to sound reason. There is nothing tangible in a debt to attach. The court can only gain jurisdiction over it through the parties. The creditor controls the debt. It is payable to him, and he may retain or assign it. It seems, therefore, that the court must ordinarily have jurisdiction over the creditor in order to exercise it over the debt, as the principal case holds. If, however, the court had controlled both the debtor and the place of payment, it would have had jurisdiction over the debt, for in that case the debt would have been entirely under its control.

CONSTITUTIONAL LAW — CORPORATIONS — STATUTE VALIDATING ULTRA VIRES CONTRACT. — *Held*, that a statute, validating an *ultra vires* contract made by a county, is not an infringement upon the judicial power and is not unconstitutional. *Erskine* v. *Steele County*, 37 Fed. Rep. 630 (Circ. Ct., N. Dak.).

The enactment is valid in either of two lights. In the first place, it is held that, even in the case of a private corporation, an *ultra vires* contract may be legalized by a subsequent act of the legislature. *White Water, etc. Co.* v. *Valette*, 21 How. 414, 425; 2 Morawetz, Private Corporations, 2d ed., § 651. Such a statute does not usurp the functions of the judiciary; but, as is said in the principal case, it gives to the contract the one element of vitality which it previously lacked, namely, the assent of the sovereign. But see *Reiser* v. *Wm. Tell Saving Fnnd Ass.*, 139 Pa. St. 137. In the second place, the decision under review may be supported as a valid exercise of the control possessed by the State over the funds of a municipal corporation. 1 Dillon, Municipal Corporations, § 62.

CONSTITUTIONAL LAW — EX POST FACTO LAWS. — A New York statute provided that any one practising medicine after conviction of a felony should be guilty of a misdemeanor. Plaintiff in error was indicted for practising medicine after the enactment of the law, having been convicted of felony and punished before its passage. *Held*, that he can be punished under the statute; the law is not in conflict with Art. I. sect. 10, of the Constitution of the United States, which provides that "No State shall . . . pass any . . . *ex post facto* law . . . ," as inflicting additional punishment for crime, but is a valid exercise of the police power of the State. *Hawker* v. *People of New York*, 170 U. S. 189.

The distinction is here pointed out between a State law intended to create a punishment for past offences, and one intended to enact a test of fitness to carry on a profession affecting the public welfare. The latter type of legislation is a valid and common exercise of the police power of the State. The law in question in the principal case seems clearly to fall within the scope of this power, and the decision is in line with previous decisions of the Supreme Court. *Dent* v. *West Virginia*, 129 U. S. 114; *Gray* v. *Connecticut*, 159 U. S. 74.

CONSTITUTIONAL LAW — INHERITANCE TAX. — The State of Illinois imposed an inheritance tax, which varied according to the amount of the legacy and according to the degree of relationship of the legatee. *Held*, that the tax does not conflict with that provision of the Federal Constitution which forbids the States to deny to any citizen the equal protection of the laws. *Magoun* v. *Illinois Trust & Savings Bank*, 18 Sup. Ct. Rep. 594. See NOTES, 12 HARV. LAW REV. 127.

CONSTITUTIONAL LAW — MANDAMUS. — *Held*, that a State court cannot issue a mandamus against the governor of the State to compel him to perform an official duty, whether or not that duty is a ministerial one. *People* v. *Morton*, 50 N. E. Rep. 791 (N. Y.). See NOTES.

CONSTITUTIONAL LAW — PRESUMPTION OF INNOCENCE. — A statute provided that upon a second conviction for certain crimes, a heavier penalty should be imposed. Defendant, being charged with robbery as a second offence, offered to admit the previous conviction, and asked to have evidence of it excluded from the jury. *Held*, that by imposing a different penalty for the second offence, it is made a new crime, and the first conviction must be proven to the jury to establish the new offence; and that it is not contrary to the Constitution of New York to submit proofs of the former conviction to the jury, because it may deprive the defendant of the benefit of the presumption of his innocence. *People* v. *Sickles*, 26 App. Div., Sup. Ct., 470 (N. Y.). Two judges dissenting.

Although the presumption of innocence has in recent times been held by most respectable authority to be affirmative evidence for the accused, *Coffin* v. *United States*, 156 U. S. 432, 460, this appears to be the first time it has been judicially claimed that it could not be constitutionally weakened by evidence introduced in the first instance by the prosecution tending to show the accused's bad character. No authority is cited for this position, and it seems untenable. No one has any vested right to rules of evidence, and the legislature can change them at will, nor need it make them uniform for all kinds of crime. It is not held unconstitutional for the legislature to make the possession of certain property, or the doing of certain acts, presumptive evidence of the commission of an offence, legislation which must certainly weaken the presumption of the innocence of the accused. *People* v. *Cannon*, 139 N. Y. 32. The dissenting opinion is, perhaps, but another vindication of the present tendency to extend constitutional guarantees into fields they were never intended to include.

CONSTITUTIONAL LAW — RIGHT TO JURY TRIAL IN TERRITORIES — EX POST FACTO LAW. — The defendant committed a felony in Utah while it was a Territory. After Utah became a State he was tried for this felony, and was convicted upon a verdict by eight jurors, as provided by the Constitution of Utah. *Held*, that the conviction was void, since the provision in the Utah Constitution, as applied to the defendant, was *ex post facto* and invalid. *Thompson* v. *State of Utah*, 18 Sup. Ct. Rep. 620. See NOTES.

CONTRACTS — GUARANTEE — DEATH OF GUARANTOR. — In consideration that the plaintiffs would discount bills for B, A guaranteed the account. *Held*, that this guarantee terminated, not on A's death, but when notice of his death reached plaintiffs. *Dodd* v. *Whelan*, [1897] 1 I. R. 575.

This case follows the decision in *Bradbury* v. *Morgan*, 1 H. & C. 249, and certain *dicta* in *Coulthart* v. *Clementson*, 5 Q. B. D. 42, and in *Harris* v. *Fawcett*, L. R. 8 Ch. 866. But *Offord* v. *Davies*, 12 C. B. N. S. 748, held that such a guarantee is determinable by notice from the guarantor, considering such a guarantee as only an offer for a series of unilateral contracts, and therefore revocable at any time as to discounts not yet made. This view, certainly the most natural one, leads inevitably to the conclusion that, since an offer cannot be accepted after the death of the offeror, the death of the guarantor revokes the guarantee at once. See *Jordan* v. *Dobbins*, 122 Mass. 168. Apparently there is only one way to reconcile the principal case with the result reached in *Offord* v. *Davies*. We may say that such a guarantee ripens into a complete contract upon the first discount; but, since the party guaranteed is not obliged to continue discounts, equity requires that the guarantor should have the right to withdraw by giving reasonable notice, unless prevented by some provision of the contract. This, however, seems a forced construction. See *Gay* v. *Ward*, 67 Conn. 147.

CONTRACTS — RESTRAINT OF TRADE — TRUST ACT OF 1890. Plaintiff contracted to convey to the defendant for a limited period the good-will of his freighting business, covenanting not to solicit freight or compete in the business during the term. In a suit for the purchase-money, *held*, that the covenant was not void under the Trust Act of 1890, and thus did not vitiate the contract. *Brett* v. *Ekel*, 51 N. Y. Supp. 573 (Sup. Ct., App. Div., First Dept.). See NOTES, 12 HARV. LAW REV. 129.

CONTRACTS — SHERIFF'S BOND — LYNCHING. — In a suit on a sheriff's bond, the plaintiffs alleged that their father, having been arrested on an accusation of murder, was intrusted to the sheriff's charge, and that, through the latter's negligent guarding of the prisoner, a mob was enabled to break into the jail and lynch the accused. On demurrer, *held*, that the declaration discloses no cause of action. *State, use of Cocking*, v. *Wade*, 40 Atl. Rep. 104 (Md.).

The peculiar features of the case render the decision of some theoretical and considerable practical importance. The opinion of the court is placed chiefly on the ground that a sheriff's duty of guarding a party under arrest is not imposed in any degree for the benefit of the prisoner or his family, but is owed to the public alone. Authorities directly in point are entirely lacking, but if the question should be elsewhere presented, the same decision would probably be reached. See Cooley, Torts, §§ 376, 393. This view, if accepted, disposes of the case. One of the judges, however, further holds that the suit cannot be maintained because, at common law, "in a civil court, the death of a human being could not be complained of as an injury," *Baker* v. *Bolton*, 1 Camp. 493; but it is more than doubtful whether this principle can be extended to actions of contract. Tiffany, Death by Wrongful Act, § 18. The ground taken by the other judge is certainly less open to attack.

CORPORATIONS — RAILROAD MORTGAGES — FORECLOSURE. — A railroad company issued three classes of bonds, each set constituting a first lien on one of the three divisions into which the road was divided, and a second lien on the other two. The mortgage provided that, in case of default, the trustee thereunder should proceed to sell first the road as an entirety, and then, if no acceptable bid were obtained, the three divisions separately. *Held*, that the court is not bound by this provision; but, upon foreclosure proceedings, may direct that the road be sold as an entirety absolutely and in the first instance. *Low* v. *Blackford*, 37 Fed. Rep. 392 (C. C. A., 4th Circ.).

The power of sale vested in the trustee is, of course, a merely cumulative remedy, and does not prevent the ordinary proceedings by foreclosure; but, on principle, any regulations which affect the substance as distinguished from the form of the remedy should be followed by the court when directing a foreclosure sale. The courts are, however, very jealous of any restrictions upon their discretionary powers in regard to foreclosure. Jones, Corporate Bonds and Securities, § 339. Indeed, a provision in a mortgage that the remedy under a power of sale should be exclusive, has been held void as ousting the courts of their jurisdiction. *Guaranty, etc. Co.* v. *Green Cove Springs & M. R. Co.*, 139 U. S. 137. But see *Chicago & Vincennes Ry. Co.* v. *Fosdick*, 106 U. S. 47. The trend of authority, therefore, seems to justify the decision in the principal case.

CRIMINAL LAW — ARREST OF MISDEMEANANTS. — A deputy sheriff shot a misdemeanant who was fleeing to escape after arrest. *Held*, that the deputy exceeded his authority, and the sheriff and his bondsmen are liable for his act. *Brown* v. *Weaver*, 23 So. Rep. 388 (Miss.). See NOTES.

CRIMINAL LAW — ASSAULT WITH INTENT TO RAPE — CONSENT. — *Held*, that an unsuccessful attempt to have connection with a girl below the age of legal consent cannot be assault with intent to commit rape if she in fact consents. *Hardin* v. *State*, 46 S. W. Rep. 803 (Tex., Cr. App.).

The case is in line with the minority of the American decisions on this point, providing the statutory definition of assault in Texas does not differentiate it from the common-law cases, — a feature which the court did not consider; it overrules two previous Texas cases, *Allen* v. *State*, 36 Tex. Cr. Rep. 381; *Callison* v. *State*, 37 Tex. Cr. Rep. 211. The English cases and a few American ones maintain that the laws regulating the age of consent in rape merely declare that consent obtained from a girl below that age cannot be set up as a defence, and do not mean that the girl is actually incapable of consenting to the carnal act. Absence of consent being the very gist of an assault, when once the girl has consented to the act, the defendant cannot be punished for assault with intent. *Reg.* v. *Martin*, 2 Moo. C. C. 123; *Smith* v. *State*, 12 Oh. St. 466. The majority of American cases, however, hold that the law conclusively implies the girl's incapacity to consent to the carnal act, and that this incapacity extends also to render her incapable of consenting to those acts which, in the absence of her consent, would constitute an indecent assault. *People* v. *Gordon*, 70 Cal. 467.

CRIMINAL LAW — VIEW OF PREMISES — PRESENCE OF ACCUSED. — *Held*, that a view by the jury of the place where the crime was committed is not part of the trial, and the defendant may waive his right to be present. *People* v. *Thorn*, 50 N. E. Rep. 947 (N. Y.). See NOTES.

EVIDENCE — CONSTRUCTION OF WILLS. — The testator devised "to my nephew W. R." He had a true nephew W. R., and his wife also had a nephew W. R. *Held*, that parol evidence is not admissible to show that the wife's nephew was the person intended to take. *In re Root's Estate*, 40 Atl. Rep. 818 (Pa.). See NOTES.

EVIDENCE — DECLARATION OF VOTER — HEARSAY. — *Held*, that the declaration of a voter, made some time after the election, is inadmissible to prove for whom he voted. *Lauer* v. *Estes*, 53 Pac. Rep. 262 (Cal., Sup. Ct.).

The declaration was mere hearsay, and was clearly inadmissible. *Gilleland* v. *Schuyler*, 9 Kan. 569; *City of Beardstown* v. *City of Virginia*, 76 Ill. 34. In England the declarations of a voter as to his disqualifications were first admitted by Parliament in contests over seats in that body, at a time when the privilege of voting depended upon the ownership of a freehold. Such declarations were held to be against the proprietary interest of the declarant, and hence within an exception to the rule against hearsay. This English rule has been adopted by Congress, although in this country declarations as to disqualifications cannot be against the proprietary interest of the declarant, since the right to vote does not depend upon a property qualification; and as an extension of this rule the declarations of a voter as to how he voted are held admissible. McCrary, Elections, 4th ed., § 483 *et seq.* There are a few judicial decisions which sanction the same practice. *State* v. *Olin*, 23 Wis. 309. They are not to be supported, however, as they violate the fundamental rule of evidence that mere hearsay is not admissible.

LIFE INSURANCE — ASSIGNMENT — WAGERING POLICY. — W. insured her life in favor of her executors, administrators, and assigns. She then assigned the policy, according to a prior agreement, in consideration that the assignee pay the premiums. The assignee had no insurable interest in the life of the insured. *Held*, that a legally entitled beneficiary may assign a life-insurance policy to one having no interest. But that the facts in this case showed the assignment to have been a colorable one, the effect of the prior agreement being to make the assignee substantially the real applicant; the policy was therefore a wagering one, and the assignee could not recover on it. *Clement* v. *N. Y. Life Ins. Co.*, 46 S. W. Rep. 561 (Tenn., Sup. Ct.).

This decision represents the prevailing view in this country, that the assignee of the beneficiary of a life-insurance policy need have no interest in the life insured. *Mutual Life Ins. Co.* v. *Allen*, 138 Mass. 24. It also seems a correct interpretation of the facts that such a policy as that in the principal case is a wagering one. An arrangement, the effect of which is to make the apparent applicant a mask for the really interested party, who stands no chance of loss beyond his premiums, clearly makes a policy a gambling transaction. *Olmstead* v. *Keyes*, 85 N. Y. 593.

MARINE INSURANCE — TOTAL LOSS. — The ship "Blairmore," insured for £15,000, sunk in San Francisco Harbor. The owners formally abandoned her as a total loss. Thereupon the insurers raised her at an expense of £9,500, and claimed that the loss was now only a partial one. The owners refused to accept the ship. *Held*, that by the principles of marine insurance such a sunken vessel is a total loss. *The Blairmore Co.* v. *Macredie*, [1898] App. Cas. 593. See NOTES.

MORTGAGES — SUBROGATION — STATUTE OF LIMITATIONS. — The devisee of a mortgagor, by representing the estate to be solvent, induced plaintiff to take a deed of the mortgaged land, assuming the mortgage. Plaintiff later paid this to prevent foreclosure, and had it discharged. The estate proving insolvent, *held*, that plaintiff was entitled to be subrogated to the mortgagee's lien, but that as against him the Statute of Limitations ran from the maturity of the mortgage note, not from the time the mortgage was discharged. *Fullerton* v. *Bailey*, 53 Pac. Rep. 1030 (Utah).

The plaintiff's right to subrogation seems plain. *Spaulding* v. *Harvey*, 129 Ind. 106; *Edwards* v. *Davenport*, 20 Fed. Rep. 756. But in Utah apparently a mortgage lien is gone when the note secured by it is barred. So the question arises whether plaintiff can recover if the statutory period has elapsed since the note became due, which was some years before plaintiff paid it. The answer depends upon whether plaintiff by subrogation obtained a new right or succeeded to an old one, like an assignee. On the analogy of suretyship, plaintiff having, in order to protect his own interests, relieved the estate from a debt, would have a new quasi-contractual right to reimbursement from the estate. *Scott* v. *Nichols*, 61 Am. Dec. 503 and note. This, however, would not do him full justice because of the estate's insolvency. The court should have carried the analogy one step further, and said that as plaintiff freed the land from a burden, the land must recompense him by a new lien in substitution for the old one.

MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENCE OF SERVANTS. — Through the negligence of the driver, a sprinkling cart in the service of the defendant struck the plaintiff's buggy and injured the plaintiff. *Held*, that the defendant is not liable, as its servant was engaged in the discharge of a governmental duty of the defendant in promoting the public health. *Connelly* v. *Mayor of Nashville*, 46 S. W. Rep. 565 (Tenn., Sup. Ct..).

It is well settled that a city is not liable for damage caused by acts performed in its govermental, as distinguished from its corporate, capacity. As to what acts should be considered governmental, the authorities are not uniform. Goodnow, Municipal

Home Rule, c. 7. The act in the principal case seems to have been such as to warrant the decision, which is in accord with the trend of authority. *Burrill* v. *City of Augusta*, 78 Me. 118.

MUNICIPAL CORPORATIONS — PUBLIC NECESSITY — RIGHT TO COMPENSATION. — Village trustees burned a mill and destroyed a dam, to prevent a flood from damaging a highway and other property. *Held*, that the village is not bound to pay compensation, since the act was justifiable on the ground of public necessity. *Atken* v. *Village of Wells River*, 40 Atl. Rep. 829 (Vt.).

This case is in accord with authority, but it seems unfortunate in its result. *Field* v. *The City of Des Moines*, 39 Iowa, 575. In times of public danger individual rights of property give way to the higher laws of impending necessity, and an owner has no claim for reimbursement for property destroyed at such a time in the interests of the public. This seems unjust; the owner has been guilty of no legal wrong, and his property should not be confiscated. On principle, it would seem that, though the community should be allowed to destroy private property at such a time, it should pay for the benefit it has received at the owner's expense. See 3 HARV. LAW REV. 189.

PERSONS — INFANTS — COMPROMISE. — An infant, by his next friend, employed an attorney to bring an action. The latter compromised the suit, consenting to an entry of judgment and satisfaction on the record. *Held*, that the infant was bound by the acts of the attorney. *Belivean* v. *Amoskeag Mfg. Co.*, 40 Atl. Rep. 735 (N. H.).

The question considered is whether an infant should be bound by such a compromise in a jurisdiction where an adult would be bound under similar circumstances. The court was unable to cite any decision directly in point, but has reached a very practical conclusion. The next friend is, in legal contemplation, an officer of the court appointed by it to act for the infant where he is under a legal disability *Guild* v. *Cranston*, 8 Cush. 506; *Baltimore & O. R. R. Co.* v. *Fitzpatrick*, 36 Ind. 619. An attorney appointed by the next friend is, therefore, an ordinary attorney of record, and there is no apparent reason why his acts in this capacity should not bind the infant, as fully as they would bind an adult by whom he had been appointed. *Tillotson* v. *Hargrave*, 3 Madd. 494; *Tripp* v. *Gifford*, 155 Mass. 108.

PERSONS — MARRIED WOMEN — SEPARATE ESTATE. — *Held*, that a married woman may charge her separate equitable estate for payment of a debt for which she is liable only as a surety. *Nat'l Exchange Bank* v. *Cumberland Lumber Co.*, 47 S. W. Rep. 85 (Tenn., Sup. Ct.).

The decision has the support of the great weight of authority. Schouler, Husband and Wife, § 249. There seems to be no adequate reason why a married woman, who is allowed to bind her separate estate by contract, should not be permitted to do so in the capacity of a surety. Some courts, however, deny a married woman the right to bind her separate estate except by such contracts as are for the benefit of her estate, and hold that contracts of suretyship are not of that nature. *Perkins* v. *Elliott*, 27 N. J. Eq. 526. This construction is properly regarded in the principal case as too narrow to accord with the present position of married women in courts of equity.

PROPERTY — CONVERSION — DAMAGES. — A innocently cut trees on land of plaintiff, manufactured them into lumber, and then sold it to defendant. In an action of trover, *held*, that the measure of damages is the value of the lumber at the time of the sale to defendant. *Wing* v. *Milliken*, 40 Atl. Rep. 138 (Me.).

This case follows the general rule of damages in trover, that the value of the property be given at the time of the conversion by the party sued. Defendant's conversion was at the moment he bought the lumber. Where the original taking is innocent, however, the majority of the courts in this country would give only the value of the trees as standing timber. *Herdic* v. *Young*, 55 Pa. St. 176; *Clark* v. *Holdridge*, 43 N. Y. Supp. 115; *Heard* v. *James*, 49 Miss. 236. They apply the rule of *Wood* v. *Moorewood*, 3 Q. B. 440, where the plaintiff in an action for conversion of coal was allowed to recover only its value in the ground. The principal case seems to state the better rule. The owner should have the value of his property at the time the defendant deprives him of it, without regard to its previous history. It is urged in support of *Wood* v. *Moorewood*, *supra*, that the plaintiff there received practically full compensation, as the value of coal is not likely to increase while it remains in the ground, and that plaintiff should not receive more than he has lost. This argument, however, whatever its force in *Wood* v. *Moorewood*, *supra*, is not applicable to the principal case, as trees may become much more valuable if allowed to stand.

PROPERTY — EASEMENTS — COVENANTS RUNNING WITH THE LAND. — A owned two adjacent tracts of land, on one of which was a grain elevator and on the other a mill. A mill-race discharged water on a wheel connected with the mill machinery, from which power was transmitted to the elevator. A sold the elevator to the plain-

tiffs, and granted the perpetual right to use the water-power. There was also an agreement in the deed that when the water-power should be insufficient to operate both the mill and elevator, the elevator should have the preference. A afterwards sold the mill to defendants. *Held*, that the grant and agreement were binding on defendants. *Hottell* v. *Farmer's Protective Ass'n*, 53 Pac. Rep. 327 (Colo., Sup. Ct.).

The right to use the water-power was an easement, and the agreement that the elevator should have the preference in case of shortage in the water supply a covenant in its aid. The court does not seem to distinguish between the easement and the covenant. In England the only exception to the rule that the burden of a covenant does not run with the land is the so-called spurious easement of fencing. In *Morse* v. *Aldrich*, 19 Pick. 449, Massachusetts has held that where the covenant is in aid of an easement, the burden runs, and that case has been generally followed in this country. The decisions in regard to covenants concerning party walls are based on this doctrine. The present case is within the principle and seems sound. To secure a beneficial use of the easement, it is necessary to carry out the terms of the covenant. This can only be done effectually by making a covenant run with the land to which the easement attaches. It has been held that a covenant to pay rent runs with the land. *Carley* v. *Lewis*, 54 Ind. 23. However, as there is an adequate remedy for the recovery of rent, this is imposing an unnecessary incumbrance on the land, and seems to be an unwarranted invasion of the general rule that the burden of a covenant does not run with the land.

PROPERTY — EQUITABLE ATTACHMENT. — X, a resident of Rhode Island, had obtained a verdict in Massachusetts against Y, in an action of tort for personal injuries, but judgment had not been entered upon the verdict. *Held*, that the verdict is not property which the plaintiff, a creditor of Y, can reach by a bill in equity, for the purpose of satisfying his debt. *Bennett* v. *Sweet*, 51 N. E. Rep. 183 (Mass.).

The nature of the claim by X against Y was not changed by the verdict. *Stone* v. *Boston, etc. Ry.*, 7 Gray, 539. Therefore the real question in the case is whether the plaintiff could reach the right of action itself by a bill in equity. In the absence of statute, a right of action for a strictly personal tort does not survive to the representatives of the injured person. Mass. Pub. St., c. 165, § 1. It is not assignable, *People* v. *Tioga Common Pleas*, 19 Wend. 73, nor does it pass to an assignee in insolvency. *Stone* v. *Boston, etc., Ry., supra.* A right of this kind cannot be reached by trustee process. *Thayer* v. *Southwick*, 8 Gray, 229. Consequently, since it is of such a personal and contingent nature as to have none of the elements of property, the decision, that it is also beyond the reach of a bill in equity, seems clearly right.

PROPERTY — ESTOPPEL — RIGHT OF WAY. — The owner of a piece of land over which there was a right of way, conveyed it to plaintiff with covenants of general warranty. Later he acquired the dominant tenement and conveyed it to defendant. *Held*, that defendant is estopped from claiming the right of way over plaintiff's land. *Hodges* v. *Goodspeed*, 40 Atl. Rep. 373 (R. I.).

In America, covenants in a deed are effectual to pass after-acquired title by estoppel. Rawle, Covenants, 5th ed., 367. This is often applied, even against a *bona fide* purchaser. *White* v. *Patten*, 24 Pick. 324. *Contra*, *Calder* v. *Chapman*, 52 Pa. St. 359. The extinguishment of an easement by such an estoppel seems at first a strange step, but it is one which an American court might naturally be expected to take. To apply this doctrine against a *bona fide* purchaser, however, as in the principal case, is much more contrary to the spirit of the registry laws than in the case of the passing of title to the land itself, as it is obviously even harder to make out any constructive notice from the records. See 11 HARV. LAW REV. 344.

PROPERTY — PAROL ANTENUPTIAL AGREEMENT — STATUTE OF FRAUDS. — *Held*, that a postnuptial settlement by the husband in favor of the wife in fulfilment of an oral antenuptial agreement to settle specific property in consideration of the marriage is not effectual against the husband's creditors. *Flory* v. *Houck*, 40 Atl. Rep. 482 (Pa.).

This case represents the prevailing doctrine in this country. Browne, St. of Frauds, 5th ed., § 224. There are decisions to the same effect in England. *Randall* v. *Morgan*, 12 Ves. 67; *Warden* v. *Jones*, 2 De G. & J. 76. *Warden* v. *Jones*, however, which was cited with approval in the principal case, has been adversely criticised in 5 Jur. N. S. (Part II) 46, and is hardly to be reconciled with *Ex parte Whitehead*, 14 Q. B. D. 419. It is generally recognized that an oral agreement for the conveyance of land is a valid contract. The Statute of Frauds simply imposes an obstacle to its enforcement. If the husband, in recognition of his moral duty, removes this obstacle by conveyance, the transaction is in no sense gratuitous and should stand against his creditors. This is the view taken when the creditors of a trustee of land, under an oral trust, attempt to

impeach as voluntary a conveyance by him to the *cestui*. The cases are analogous in principle and should be decided alike. The authorities are collected in Ames, Cases on Trusts, 2d ed., 181.

STATUTE OF LIMITATIONS — INJUNCTION AGAINST PLEADING STATUTE. — Plaintiff, an attorney, contracted with defendant to collect on commission certain bonds due the latter. Defendant later sold the bonds without notifying plaintiff, who did not learn of the sale until ten years afterward. Plaintiff then sued at law for breach of contract, and, on defendant setting up the Statute of Limitations, brings this bill in equity to enjoin the pleading of the statute. *Held*, that plaintiff is entitled to the relief asked. *Halloway* v. *Appelget*, 40 Atl. Rep. 27 (N. J., C. A.).

There is no doubt that there was equity in the plaintiff's bill. Although the majority of the cases in which a defendant has not been allowed to plead the Statute of Limitations have been those in which the act giving rise to the action was itself fraudulent, there is no reason why equity should not interfere on the same principle when the defendant by his fraud, after the right of action accrues, aims directly at obtaining an unfair advantage by reason of the statute. *Rolfe* v. *Gregory*, 34 L. J. Ch. N. S. 274. It is more doubtful whether the relief afforded was the right relief. By enjoining the defendant from setting up his defence, and then letting the case go from its own control, the Court of Chancery obtained no assurance that the plaintiff himself would do equity. It would seem that the plaintiff should have filed his bill for relief upon the original contract, asking the Court of Equity to take complete control over the case. The court could then, in its own discretion, have forbidden the defendant to set up the statute, and at the same time could have prevented the plaintiff from making an inequitable use of his advantage. *Aston* v. *Lord Exeter*, 6 Ves. Jr. *a*, 288; *Hylton* v. *Morgan*, 6 Ves. Jr. 293. It is to be noted, however, that in England, and in most jurisdictions where law and equity are administered in the same courts, the plaintiff could have gained his point by an equitable replication. *Gibbs* v. *Guild*, 8 Q. B. D. 296; 9 Q. B. D. 59.

TORTS — HOMICIDE — YEAR AND DAY RULE. — The plaintiff brought a statutory action to recover damages for her husband's death, which resulted from injuries caused by the defendants. *Held*, that recovery is not barred because death occurred more than a year and a day after the injuries were inflicted. *Western & Atl. R. R. Co.* v. *Bass*, 30 S. E. Rep. 874 (Ga.).

The case is interesting because the point has seldom been raised. The decision doubtless presents the correct view. The year and a day rule is an arbitrary rule of criminal law founded on grounds of public policy, and it should have no application in civil cases, where the only question is whether the defendant's act is the proximate cause of the death for which an action is brought. *Louisville & St. L. R. R.* v. *Clarke*, 152 U. S. 230; *Schlichting* v. *Wintgen*, 25 Hun, 626 (N. Y.).

TORTS — INVASION OF PRIVACY. — The defendant in an advertisement of his medicine published of the plaintiff with substantial truth but without authorization: "Dr. Morgan Dockrell is prescribing Sallyco; he says nothing has done his gout so much good." *Held*, that plaintiff has no cause of action. *Dockrell* v. *Dougall*, 78 L. T. R. 840. See NOTES.

TORTS — NEGLIGENCE — INTERVENTION OF A THIRD PARTY. — The plaintiff was injured by a trunk being thrown against him during a struggle between public porters over baggage left in an insecure position by a servant of the defendant. *Held*, that the negligence of the defendant's servant was not the direct and proximate cause of the plaintiff's injury. *Murphy* v. *Great Northern Railway Co.*, [1897] 2 I. R. 301.

The case is on the border line, but is correctly decided if the result could not have reasonably been foreseen by the original wrongdoer, — a point upon which the judges touch but lightly. The general rule is that the intervention of a malicious and intentional act of a third party relieves the original wrongdoer of any liability for the results of his negligence. *Alexander* v. *Town of New Castle*, 115 Ind. 51. The mere negligence of an intervening third party, however, does not necessarily break the causal connection between the injury and the original act, especially if, under the circumstances, the intervening negligent act ought to have been anticipated. *Lane* v. *Atlantic Works*, 111 Mass. 136. The present case seems to have been put on the ground that the acts of the porters were acts of "affirmative misconduct" and not of mere negligence. It is questionable whether the majority of courts in this country would follow this case when the misconduct of the third person ought to have been foreseen.

TORTS — NEGLIGENCE — LANDOWNER'S LIABILITY TO CHILDREN. — *Held*, that a railroad company is not liable for an injury by a turn-table to an infant trespasser. *Delaware, etc. R. R.* v. *Reich*, 40 Atl. Rep. 682 (N. J., C. A.). See NOTES.

TORTS — NEGLIGENCE — LIABILITY FOR FALSE STATEMENTS. — Defendants, directors of a bank, negligently but not fraudulently made false statements as to the condition of the bank. Plaintiff, relying on these statements, purchased stock, which proved worthless. *Held*, that defendants are liable for the damage caused by their statements. *Houston* v. *Thornton*, 29 S. E. Rep. 827 (N. C.).

The English House of Lords decided, in *Derry* v. *Peek*, 14 App. Cas. 337, that similar facts would not support an action of deceit. That case has generally been regarded as settling in England that no action will lie for negligent misstatements. *Angus* v. *Clifford*, [1891] 2 Ch. D. 449. There was, however, no allegation of negligence in the declaration, so that the point is really a *dictum*. Massachusetts has followed the English doctrine. *Nash* v. *Minn. Title and Trust Co.*, 163 Mass. 574. But in many States the question is still open. The decision in the principal case seems sound. Granting that deceit will not lie, it seems that an action for negligence should. One who makes positive statements, intending them to be acted upon, should be bound to use ordinary care to see that they are warranted, at least when the statements are made to secure a result which will operate to the personal advantage of the one making them.

TORTS — SLANDER — PRIVILEGE. — *Held*, that to justify the speaking of slanderous words on the ground of privilege it must appear, not only that the defendant believed he was speaking the truth, but that there were reasonable grounds for such belief. *Toothaker* v. *Conant*, 40 Atl. Rep. 331 (Me.).

The question raised has been passed upon in only a few American jurisdictions, and the majority of the decisions are in accord with the principal case. *Carpenter* v. *Bailey*, 53 N. H. 590; *Express Printing Co.* v. *Copeland*, 64 Tex. 354; *Briggs* v. *Garrett*, 111 Pa. St. 404. In England it is held that a defendant may avail himself of the defence of privilege if his motive is not wrongful and he has an honest belief in the truth of his statements. *Clark* v. *Molyneux*, 3 Q. B. D. 237. In accord with the English decisions is *Bays* v. *Hunt*, 60 Iowa, 251. It seems to be the better view, however, that immunity is extended sufficiently if a defendant is allowed to escape liability for defamatory statements only when they are made upon a reasonable belief in their truth. This rule checks the spreading of false reports coming from sources on which many persons would rely, but which reasonable people generally would not credit.

TRUSTS — RIGHT TO FOLLOW TRUST FUNDS. — A trustee placed trust funds in the hands of a firm which had knowledge of the trust relation. The firm used the funds in its business and, when dissolved by the death of a partner, was found to be insolvent. *Held*, that the *cestui que trust* is entitled to the amount of the converted trust funds in preference to the claims of the firm's creditors. *Evangelical Synod* v. *Schoeneich*, 45 S. W. Rep. 647 (Mo.).

The rule of equity which allows a *cestui que trust*, whose funds can be traced into the assets of a bankrupt estate, to take preference over the general creditors of the bankrupt, has met with much favor in the courts of this country. *Nat. Bank* v. *Ins. Co.*, 104 U. S. 54. A failure, however, to appreciate the principle upon which the doctrine must rest has led some courts to extend its application further than a just regard for equity would warrant. *McLeod* v. *Evans*, 66 Wis. 401. The present case seems to be open to this criticism. A departure from the principle that among creditors equality is equity can be justified only when necessary to prevent the general creditors from enriching themselves at the expense of a *cestui que trust*. When it does not appear that the trust funds form a part of the assets for distribution among the bankrupt's creditors, it is not a case of unjust enrichment of the creditors, and there can be no ground upon which to give the *cestui que trust* a preferred claim. This line of reasoning was used to defeat the claims of a *cestui que trust* in *Cavin* v. *Gleason*, 105 N. Y. 256. See also *Metropolitan Nat. Bank* v. *Campbell*, 77 Fed. Rep. 705. It does not appear from an examination of the facts of the present case that the plaintiff could trace the trust funds into the insolvent firm's assets, and for that reason the decision appears to be unsound.

TRUSTS — SPECIAL DEPOSIT. — A debtor deposited in a New York bank the amount due from him to a creditor in Helena, Montana. The New York bank telegraphed the Helena bank to pay the debt and charge the amount to its account. The Helena bank refused to pay the creditor except in New York exchange, which the creditor refused to accept. He also refused to allow the amount to be placed to his credit in the bank. The Helena bank failed before the creditor was paid. *Held*, that the Helena bank held the amount due the creditor as a special deposit, and he was entitled to it in preference to the general creditors. *Moreland* v. *Brown*, 86 Fed. Rep. 257 (C. C. A., Ninth Cir.).

The decision must be regarded as unsound. The court quotes with approval the case of *Farley* v. *Turner*, 26 L. J. Ch. 710, in which a misconception as to the nature

of the trust *res* led to much confusion of reasoning, although the decision was correct. A much sounder case is that of *In re Barned's Banking Co.*, 39 L. J. Ch. 635, which held that the relation created by a deposit of money with a bank for the purpose of removing an indebtedness to a third party is not one of trust, but of debtor and creditor. Business expediency requires that a bank be permitted to mingle with its own funds deposited for such purposes. There can, therefore, be no specific trust *res*, and the bank must be regarded as the debtor of the depositor.

REVIEWS.

THE LAW OF WILLS, for Students. By M. M. Bigelow. Boston: Little, Brown, & Co. 1898. pp. xxxii, 398.

In contrast with the voluminous text-books at present in vogue, it is refreshing to notice a small, compact, and well-written law-book. Such a book is Mr. Bigelow's work on the law of wills. No claim is made to any great originality; limitation of space forbids full discussion of principle. But as a summary, the book has a distinct reason for its existence, which is no small praise. If criticism were to be offered, it would be that for so compact a work the details of the minute rules for the "secondary construction" of wills are examined with a care more than likely to confuse the student, and of value chiefly to a professional. Yet it is mainly for the student that the book is written.

The substantive law is completely stated. The ground taken in regard to the construction of wills is somewhat to be regretted, the adherence to the narrow rule as set forth by Sir James Wigram (p. 161). A broader rule would have been more satisfactory. See NOTES. In view, moreover, of the full discussion of how to construe an ambiguous word by the context, the rules of construction by means of extrinsic facts are neglected, — rules which seem to be, not as the author contends, merely rules for defining the primary meaning of the words, but rules of construction for determining between the primary and the secondary meanings (p. 162). One other matter is too severely stated, the test of undue influence (p. 85). While the author admits that persuasion by wife or child may not amount to undue influence, he says that persuasion by one whose power is illegitimate, as, for instance, a mistress, is undue. This conclusion hardly seems sound. Undue influence must be coercion. Mental coercion it may be, but persuasion is not coercion at all. *Wingrove* v. *Wingrove*, 11 P. D. 81. Criticism, however, may give a false impression, for there are few things to be criticised adversely. The many applications of the rules of revocation are well treated, and the author's adherence to principle is commendable when he finds "grounds to doubt" whether a will can be looked upon as revoked when the testator's purpose to revoke was frustrated by the misconduct of another. In general, as a handbook of the subject, the work succeeds.

J. G. P.

THE HUDSON'S BAY COMPANY'S LAND TENURES AND THE OCCUPATION OF ASSINIBOIA BY LORD SELKIRK'S SETTLERS. With a List of Grantees under the Earl and the Company. By Archer Martin. London: William Clowes & Sons, Limited. 1898. pp. ix, 238.

In 1634 a vast tract of American territory was granted the "Governor and Company of the Hudson Bay Adventurers." The Company, in